Witnesses 5 and 6 to her husband to the effect that if he did not divorce her she would give him as much trouble as possible is certainly some evidence of maliciousness and also I think of malice in the sense of improper motive; but it is not in my opinion evidence of absence of reasonable and probable cause.

The undisputed facts that for some time the husband had been paying his wife maintenance whilst she was in her own house; that she had throughout her married life with her present husband lived in her own house; and that her husband had ceased to provide her with any maintenance — these facts appear to me to negative absence of reasonable and probable cause, because in these circumstances a wife might reasonably suppose that she would be entitled to an order for maintenance.

Although the defendant was an entirely unreliable witness and I would not accept her evidence upon any point in respect of which there was evidence the other way I was satisfied on the evidence as a whole that, however mixed her motives in commencing the proceedings, she did genuinely and upon not unreasonable grounds believe herself entitled to an order for maintenance.

In my opinion, therefore, the plaintiff has not made out his case and there must, therefore, be judgment for the defendant.

Judgment for the defendant.

Solicitor for the plaintiff: *Jag-Jit Singh.*

Solicitor for the defendant: *Ong Huck Lim.*

LEE BOON GAN (f) v. REGINA.

[A. Cr. J. (Spenser Wilkinson, J.) March 16, 1954]

[Penang — Criminal Appeal No. 2 of 1954]

Gaming — Common Gaming Houses Ordinance, 1953, s. 11 — Presumption under — Physical possession — Whether sufficient evidence to base inference of knowledge that accused knew general nature of thing alleged to be in her possession — Affidavits in Criminal Appeals — Statement from the dock — Value of.

The appellant was convicted on the ground that she was found in possession of gaming slips. The slips were satisfactorily proved to have been memoranda of stakes relating to three types of lottery. She appealed on the ground that the presumption under section 11 of the Common Gaming Houses Ordinance, 1953, can only arise after possession has been proved.

Section 11 reads as follows: "Any person . . . found in possession of . . . any account, memorandum, etc. relating to a lottery shall be presumed until the contrary is proved to be assisting in a public lottery then in progress."

Possession, however, as defined in **Toh Ah Loh** v. **Rex**(1), is as follows: "Possession, in order to incriminate a person, must have the following characteristics. The possessor must know the nature of the thing possessed; must have in him a power of disposal over the thing; and lastly must be conscious of his possession of the thing."

Also in the case of **Chiah Tian** v. **Rex**(2) it is defined as follows: "A person is not guilty of the offence of possession if he is not aware of the possession. There must be some evidence from which it can reasonably be inferred that the accused knew the general nature of the thing alleged to be in his possession . . . ."

The only evidence that could be inferred was that the accused attempted to avoid apprehension.

Held: the word "attempted" used by the prosecution witness is mere prejudice and the evidence amounts to more than that the appellant started to go towards the front portion and came back as soon as she was called. This does not seem to be sufficient upon which to base an inference of knowledge of what had been thrust into her hands. As the basis of the decision of the learned Magistrate was the presumption under section 11 and possession was not proved the appeal must be allowed and conviction quashed.

An affidavit was filed explaining that at the end of the prosecution case the three courses open to the appellant (who was not represented by counsel) were not properly explained to the appellant by the interpreter.

Held: there is no provision of the Criminal Procedure Code which permits affidavits to be filed in a criminal appeal or upon a criminal revision unless so ordered by the High Court. There are circumstances in which certain applications can be made in appeals by motion in which case it would be proper to file affidavits in support of the motion, but affidavits are not receivable as part of the proceedings in an appeal except in support of a specific motion.

Another ground of appeal was that the learned Magistrate appeared to have assumed that a statement from the dock was not sufficient proof for the purposes of rebutting the presumption arising under section 11 of the Common Gaming Houses Ordinance, 1950.

Held: the weight to be attached to a statement from the dock is essentially a matter for the trial Magistrate.

Cases referred to:—

(1) *Toh Ah Loh and Mak Thim v. Rex* (1949) M.L.J. 54.

(2) *Chiah Tian v. Rex* (1937) M.L.J. 105 at 106.

(3) *Rex v. Kwek Kim Chuan* (1910), Braddell C.G.H. 2nd Ed. at p. 169.

CRIMINAL APPEAL.

Lim Kheng Kooi for the appellant.

J. D. Peterkin (Federal Counsel) for the respondent.

Cur. Adv. Vult.

Spenser Wilkinson, J.: — The appellant was charged jointly with another accused with assisting in carrying on a public lottery under section 4(1)(c) of the Common Gaming Houses Ordinance, 1953. There were three charges, the first being in respect of 100 number lottery, the second in respect of 1,000 number lottery and the third in respect of 10,000 number lottery.

The principal ground upon which appellant was convicted was that she was found in possession of three packets consisting of 3 wrappers and 28 slips of paper. The 28 slips of paper were satisfactorily proved to have been memoranda of stakes relating to the three types of lottery, and the learned Magistrate quite properly so held. The circumstances in which the appellant was found in possession of these documents were deposed to by the 2nd Prosecution Witness as follows :—

"As soon as I entered the premises I got up to the staircase in the centre portion of the ground floor, I saw the 2nd accused running upstairs.

I followed him upstairs.

I saw him hand over three packets to 1st accused upstairs near the staircase.

He went to the open space at the back upstairs and was washing the clothes.

There was a girl washing clothes there and 2nd accused joined her.

1st accused attempted to go to the front portion upstairs.

I called to her to come back.

She came back.

P.W. 1 arrived upstairs.

She was still holding the three packets in her hand.

I pointed out to P.W. 1 the packets which she had in her hand.

I took the packets and handed them to P.W. 1."

There was no other material prosecution evidence regarding the possession by the appellant of these documents and in a statement from the dock the appellant said :—

"I did not collect any bets pertaining to 100, 1,000 and 10,000 number lotteries. I have nothing else to say."

The first ground of appeal was that the presumption under section 11 of the Common Gaming Houses Ordinance can only arise after possession has been proved. The relevant part of section 11 reads as follows :—

"Any person . . . . found in possession of . . . . any account, memorandum, etc. relating to a lottery shall be presumed until the contrary is proved to be assisting in a public lottery then in progress."

I am of opinion that the possession referred to in this section is the kind of possession which has frequently been defined for the purposes of criminal cases. In *Toh Ah Loh and Mak Thim v. Rex*[1] the following passage appears in the judgment of the Court of appeal :—

"Possession, in order to incriminate a person, must have the following charactoristics. The possessor must know the nature of the thing possessed, must have in him a power of disposal over the thing, and lastly must be conscious of his possession of the thing."

Again in the case of *Chiah Tian v. Rex*[2] McElwaine, C.J. said :—

"I think that a person is not guilty of the offence of possession if he is not aware of the possession. There must be some evidence from which it can reasonably be inferred that the accused knew the general nature of the thing alleged to be in his possession, such as evidence of the length of time he had the object, evidence that he was expecting it, evidence of course of business, or any other evidence from which an inference of knowledge of the general nature of the thing can be inferred."

It appears to me from the evidence set out above that the facts are equally consistent with this appellant knowing or not knowing what the packages were that were handed to her. That she had physical possession of them there is no doubt, but I cannot find anything in the evidence from which an inference can fairly be drawn that she must have known the general nature of these documents. The learned Deputy Public Prosecutor was unable to point to any circumstances from which such an inference could be drawn, except the allegation that the appellant attempted to go to the front portion upstairs. He agreed that in order to constitute possession for the purposes of section 11 there must be some knowledge on the part of the possessor of the articles possessed. In my opinion the use of the word "attempted" by the witness is mere prejudice and his evidence amounts to no more than that the appellant started to go towards the front portion upstairs and came back as soon as she was called. This does not seem to me to be sufficient upon which to base an inference of knowledge of what had just been thrust into her hands.

There were two other grounds of appeal. The last of these I did not allow to be argued. It was contended that at the end of the prosecution case the three courses open to the appellant (who was not represented by Counsel) were not properly explained to the appellant by the Chinese interpreter. The following passage appears on page 11 of the record :—

Case for the prosecution.

"Accused 1 and 2 informed of three courses open to them.

1st accused (that is to say the Appellant) elects to make a statement from the dock."

Although I can find no direct authority on the subject I am of opinion that for the purposes of an appeal the record is conclusive. Counsel for the appellant suggested that under my revisionary powers I could receive affidavit evidence in regard to this matter and affidavits were, in fact, filed by the appellant, her husband and a friend of hers and a counter affidavit was filed by the Court interpreter.

Whilst I am not prepared to say, as at present advised, that there are no circumstances in which the accuracy of the record can be gone into on revision, particularly under the very wide powers of revision now given to the High Court by section 57 of the Courts Ordinance, 1948 I did not think that this was a case in which this could or should be done. Moreover, I know of no provision of the Criminal Procedure Code which permits affidavits to be filed in a criminal appeal

or upon a criminal revision unless so ordered by the High Court. There are circumstances in which certain applications can be made in appeals by motion in which case it would be proper to file affidavits in support of the motion, but in my opinion affidavits are not receivable as part of the proceedings in an appeal except in support of a specific motion.

In view of these considerations and of the clear statement on the record that the three courses open to the appellant had been put to her I did not allow the affidavits to be read, and this ground of appeal was, therefore, disallowed.

Another ground of appeal was that the learned Magistrate appeared to have assumed that a statement from the dock was not sufficient proof for the purposes of rebutting the presumption arising under section 11 of the Common Gaming Houses Ordinance. Mr. Lim Kheng Kooi for the appellant cited the case of *Rex v. Kwek Kim Chuan*[3], a report of which appears in *Braddell on Common Gaming Houses*, 2nd edition, page 169. In the course of his judgment in that case Fisher, J. said:—

"It was urged for the Crown that proof can only mean evidence, and evidence in the legal sense of sworn testimony — and that as none of the accused gave evidence on oath but simply made statements there is no proof here at all. . . . . .

It seems to me that I must consider their recorded statements (which are of course recorded for a purpose), and give such weight to them as they appear to me to carry. They appear to me (there are only two) to be quite sufficient to rebut the presumption raised by the section, and to prove that this was a private party and that the place where it was held was not a common gaming house at all; and the whole circumstances of the case strongly corroborate this view."

It appears that in that case there were circumstances corroborating the accused's statement but except where there is corroboration it seems to me that there can be very few cases in which a statement made by the accused from the dock, which cannot be tested by cross-examination, can by itself amount to proof of anything. Such a statement may, it is true, raise a reasonable doubt in favour of the accused and may thus result in parts of the prosecution case not being proved, but in my view it would have to be a very convincing statement before it could, by itself, rebut a presumption of law. It is to be observed that in section 3 of the Evidence Ordinance it is provided that a fact is said to be proved when after considering the *matters* before it the Court believes it to exist, and I think there is no doubt that a statement by the accused is one of the matters before the Court, although it may not be, strictly speaking, evidence. It would appear, therefore, that the Court must at least take it into consideration.

However this may be, it is clear to me that the weight to be attached to a statement from the dock is essentially a matter for the trial Magistrate and as it is clear from his grounds of judgment that he took the statement into consideration I am of opinion that there is no substance in this ground of appeal.

Coming back, then, to the first ground of appeal, as the basis of the decision of the learned Magistrate was the presumption under section 11 and as possession was not proved I had no alternative but to allow the the appeal on this ground and to quash the conviction.

Appeal allowed.

Counsel for appellant: *Lim Kheng Kooi.*

Re SYED ALWI ALKAFF, DECD.; ALKAFF v. ALKAFF & ORS.

[O. C. J. (Brown, J.) March 17, 1954]

[Singapore — Originating Summons No. 255 of 1953]

Will — Specific devise — Subsequent settlement of same property — Powers of revocation and new appointment in settlement — Effect of Wills Ordinance, ss. 18 & 19.

By his will dated 27th August 1924 the Testator gave five houses described as Nos. 86, 87, 88, 89 and 90 Robinson Road to his Executor to hold upon various trusts of a charitable nature. By a Settlement dated 14th April 1925 he conveyed the same five houses to Trustees to hold upon trust for himself for life, and thereafter upon various charitable trusts which were different from those contained in the Will. In the Settlement he reserved for himself the power "at any time thereafter by . . . will or codicil expressly referring to . . . the property subject (to the Settlement)", to revoke the trusts contained in the Settlement and to declare new trusts "for the benefit of himself, . . . his heirs executors or administrators or of any other person or persons". The Settlor died on 29th August 1926 without either having revoked his said will or having made any further Will in exercise of the power of revocation and appointment contained in the Settlement.

The Trustee of the Will of the Testator applied to Court by way of Originating Summons to determine whether upon the death of the Testator, and having regard to the provisions of either Section 18 or Section 19 of the Wills Ordinance, the trusts of the Will were to be given effect to, or whether the property was to be held upon the trusts set out in the Settlement.

Held: (1) if the Settlement had not expressly required the Will to revoke the trusts of the Settlement before making a new appointment of the trust property, the specific devise of the property in the previous Will would have operated by virtue of Section 19 of the Wills Ordinance as a valid exercise of the subsequently created general power of appointment. (Airey v. Bower[1] and Patch v. Shore[2] followed); (2) in the present case, however, before any new appointment could be made the trusts of the Settlement had to be revoked by the Will, and the Court had to be satisfied that the Will evidenced an intention to exercise that power of revocation. Notwithstanding Section 19 of the Wills Ordinance, no such intention could be imputed in the present case: Section 19 only applies in the absence of a contrary intention appearing on the face of the Will and the fact that the Will was dated prior to the Settlement which created the power of revocation was itself sufficient in the present